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SUBJECT: FRANCE: RESPONSES TO USG POINTS ON NO-FLY AND DATA PRIVACY
LEGISLATION

REF: A) STATE 66769 B) STATE 56285 B) PARIS 2432 C) PARIS 2316

11. (SBU) Summary: We have raised the issue of the proposed submission of airlines No-Fly screening to the French Data Privacy Authority (CNIL) (refS A and B) in meetings with officials from the General Secretariat for State Security (SGDN) April 11, April 27 and May 9, the Civil Aviation Authority (DGAC) April 21 and 28, MFA May 5, and conversations with Air France officials April 13 and April 28. (TSA/TSNM General Manager Richard Stein participated in the April 28 discussions. EB/TRA DAS John Byerly participated in the May 9 conversation.) Non-papers drawn from reftels have been circulated to contacts at MFA, Ministry of Justice, and the Ministry of Transportation. The following provides a summary of the principal results of our discussions.

No No-Fly Means No Flying

12. (SBU) We have clearly delivered the message to the GOF that any interruption of No-Fly screening resulting from a decision by the CNIL would mean the interruption of flights to the U.S., and have been repeatedly assured that this is clearly understood. General Secretariat for National Defense Director of State Security Bernard

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Boube told Emboffs April 11 that the GOF was in general supportive of the No-Fly system. After substantial interagency coordination, it had decided to move ahead now, before a potentially unfavorable decision from the European Court of Justice decision on PNR that could make the political environment for CNIL approval more unfavorable. On April 28 Director General of Civil Aviation Michel Wachenheim echoed these points. However all of our interlocutors have also stressed that the CNIL is an independent body, with authority to judge what criteria are applicable in a given case. Boube in particular emphasized that the GOF had received no advance assurances of success from the CNIL before coming to its decision.

A Government or Airline Responsibility?

13. (SBU) In response to our points detailing GOF obligations to provide for aviation security under existing international agreements, Boube said that under French data privacy law this was a responsibility for individual airlines rather than the French government, because the airlines performed the data processing (ref C). He detailed long-standing legal concerns about No Fly screening, including its vulnerability to lawsuits by passengers. The GOF had decided to inform airlines that they would need to apply to the CNIL for approval of their No Fly screening procedures after an in-depth Ministry of Justice legal analysis. We requested that we be given a copy.

14. (SBU) Boube also indicated that the Civil Aviation Authorities had been tasked with explaining their obligations to the carriers, and had recommended to them that their applications be coordinated under a procedure provided for in the 1978 law on data privacy. Air France had volunteered to take the lead in producing an application, which other carriers could adopt.

15. (SBU) In a follow-up conversation April 21, DGAC Technical and Strategic Affairs Director Paul Schwach, and DGAC Security Chief Jacques le Guillou confirmed that the GOF had considered a number of options before deciding to proceed, including some form of government-to-government agreement. Alternative approaches (a negotiated agreement, a specific law, an additional article added to a US/EU Open Skies agreement etc.) had been rejected, because they would have required Parliamentary approval, including a specific exemption from the legal requirement for approval by the CNIL. They did not believe that our points about the security provisions under existing agreements such as the Chicago Convention and U.S. France air services agreement addressed these specific requirements under French law.

A Collective Application?

16. (SBU) Schwach and Le Guillou also provided their point of view on what a collective application from the carriers might look like. They noted that Both APIS and PNR data would be concerned by a CNIL review, as both were implicated in name matching. Transmission to the US would not be part of the case, in their opinion. They believed that the future quick query/"secure flight" alternative would minimize or eliminate the need for CNIL approval, as the processing would all be done offshore.

17. (SBU) Schwach and Le Guillou agreed that the situation of Air France, which applies special procedures for No Fly notification mandated by the GOF, and the fact that much of the U.S airlines' processing was performed offshore, could make a joint application more complicated to prepare. It was unclear whether future EAs or technical modifications to existing procedures would require additional applications to the CNIL. They did not believe the issue of the security justification or adequacy of NF screening would be raised, but in the end also admitted that the CNIL was independent, and had the authority to judge whether this sort of application was pertinent or not.

18. (SBU) In a meeting with Civil Aviation Director Michel Wachenheim April 28, Emboffs and TSA representatives explained the U.S. position, and mentioned in particular Washington concern with the idea that all air carriers apply to the CNIL for approval simultaneously. Wachenheim said that he could not guarantee that if the data was processed outside of French territory that this would resolve the issue with the CNIL. He added that he did not believe that the CNIL would ban processing of the No Fly list, but that they might prohibit specific procedures airlines used to match passenger information against the list, or require additional steps such as notification of passengers, echoing the relatively optimistic view of other DGAC interlocutors, who have told us they feel the CNIL would be open to constructive engagement on the issue. He mentioned that future meetings would be held to discuss these issues further within the GOF.

Air France's View

19. (SBU) After initial consultations with Air France's Legal Staff April 11 indicated that it did not plan to seriously take up the issue until early May, Emboffs met with Air France Vice-President for International Affairs Guy Tardieu April 28 to get its views on a potential application to CNIL. Tardieu indicated that Air France had not yet reached a decision about how to respond to the DGAC's invitation to carriers to apply to the CNIL. He indicated that Air France had regular contacts with the CNIL, which had so far tolerated its No Fly screening procedures (e.g. absence of notification of passengers), perhaps with the expectation that offshore processing would eventually solve the problem. This was Air France's view as well, and he hinted that they might delay submitting an application to the CNIL until the Fall with the hope that the proposed APIS Quick Query (AQQ) System would be operational by then. If an application went ahead, Tardieu believed the CNIL would be realistic, and at most might require a new disclosure statement. In any case, Air France had not yet coordinated with other airlines, and still needed to assess whether a common application to the CNIL would best serve its interests.

110. (SBU) In a May 9 lunch meeting with SGDN's Boube and visiting EB/TRA DAS John Byerly, Economic Minister-Counselor noted that Air France seemed much less seized with the urgency of the issue than is the GOF. Air France is of the view that proposed future changes in the processing of No Fly name queries in the U.S. (e.g., APIS Quick Query) could obviate the need to go to CNIL. Boube took the point, and confirmed that the GOF is taking stock of Embassy approaches on the issue over the past few weeks. The Prime Minister's office is expected to chair a meeting shortly to discuss the entire issue.

Our Advice: Go Slow

111. (SBU) Without dismissing the real concerns that might lay at the base of the GOF's recommendations to airlines to apply to the CNIL, based on what we have heard so far, we think it inappropriate at present to advise U.S. carriers to dive into such murky legal waters, in particular given the absence of any indication from CNIL that this is an urgent requirement. The GOF's reasoning--as they have explained it to us--is primarily political: that it is better to move ahead now, before privacy advocates in Parliament and the CNIL are reinforced by a potentially unfavorable ECJ decision on PNR. However, aside from the uncertainty about what the ECJ might decide, it is clear that it will in any case render a decision before the CNIL considers this case. In addition, the GOF does not seem to have fully considered the technical complexities of No Fly processing for U.S. carriers, or the impact of GOF-mandated No Fly procedures that affect only Air France before recommending a common application process. Given this, it does not seem likely that the airlines will find it easy to quickly coordinate a common approach.

112. (SBU) We will continue to probe for additional details from the GOF on its legal analysis, and to see if some kind of

government-to-government approach might provide an alternative way
of resolving the issue.
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